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No. 79-2071

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRED C. SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that (1) no proper foundation was established for admission of tape recordings of his conversations with a government informant, (2) he was improperly denied a month-long continuance to enable his expert witness to examine the notes of a government expert witness, (3) one of the jurors should have been dismissed for medical disability, and (4) the evidence was insufficient to prove two counts of the indictment.

1. Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on four counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1), and on two counts of using a communication facility in causing and facilitating the distribution of cocaine, in violation of 21 U.S.C.

843(b).[1] He received concurrent sentences of six years' imprisonment to be followed by three years' special parole on each of the cocaine distribution counts and four years' imprisonment on each of the communication facility counts, to run concurrently with each other and with the sentences imposed on the cocaine distribution counts (Pet. App. 2a). The court of appeals affirmed per curiam without opinion (Pet. App. 3a).[2]

The evidence adduced at trial showed that Alan Dewey, an informant acting in cooperation with officials of the Drug Enforcement Agency and the local sheriff's office (Tr. 36-38, 81, 89-90), made monitored purchases of cocaine from petitioner on March 7, 1979, March 9, 1979, and twice on April 2, 1979 (Tr. 37-39, 47-50, 52, 56-57, 59-60, 95-99, 124-125, 127-130, 159-160, 165-169, 192-193). The purchases were arranged by telephone calls that Dewey made to petitioner. Some of the calls were made from Dewey's home or the DEA office (Tr. 42-43, 45, 118, 160-163, 195), and some were made from telephone

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[1]A seventh count, charging a violation of 18 U.S.C. 922(h) and (i), was severed prior to trial (Pet. 4; Tr. 35).

[2]The petition for a writ of certiorari is out of time. Under Rule 22.2 of the Rules of this Court in effect on the date judgment was entered in this case, the petition for a writ of certiorari was due for filing within 30 days of the entry of judgment. The court of appeals entered an order denying a petition for rehearing on April 30, 1980 (Pet. App. 4a). Accordingly, the petition for a writ of certiorari was due for filing on May 30, 1980, but was not filed until June 28, 1980. Contrary to petitioner's apparent assumption (Pet. 2), the date of the issuance of a mandate has nothing to do with the time for filing a petition for a writ of certiorari. See R. Stern & E. Gressman, *Supreme Court Practice* 395-396 (5th ed. 1978). (In any event, it appears that petitioner's motion for a stay of the issuance of the mandate was denied on May 19, 1980 (Pet. App. 5a-6a).)

booths (Tr. 49, 121). The calls made from Dewey's home were heard and recorded at the sheriff's office (Tr. 43, 55, 133-135, 160-161, 174-177) and the call from the DEA office was recorded while being made (Tr. 45). The communication facility counts were based on a telephone conversation between Dewey and petitioner on March 8, 1979, in which the March 9 purchase was arranged (Tr. 42-43, 160-163, 316), and two telephone conversations on April 3, 1979, in which a fifth purchase was arranged for the following day (Tr. 132-133, 137-140, 174-177, 317). The latter purchase was aborted by petitioner's arrest (Tr. 64-65, 213, 217).

2. During trial, the government offered into evidence and played for the jury tape recordings of the March 8 telephone conversation, upon which the first communication facility count was based (Tr. 106-108), a March 9 telephone conversation leading to the cocaine purchase on that date (Tr. 119-124), and the two April 3 telephone conversations, upon which the second communication facility count was based (Tr. 137, 139-140). Contrary to petitioner's contention, an adequate foundation was established for the admission into evidence and the playing to the jury of each of the four recordings.

DEA Agent Molyneaux testified that the March 8 call was made from Dewey's home on a three-party telephone line and that he listened while the conversation took place and was simultaneously recorded (Tr. 43). Molyneaux identified the recording that was offered into evidence as that which was made while the March 8 conversation took place (Tr. 44-45). With respect to the March 8 telephone call as well as the two April 3 telephone calls that were also made from Dewey's home, both Dewey and William Renton, a Jefferson Parish sheriff's office narcotics agent who had made the recordings, stated that they had listened to the recordings prior to trial and that

the recordings accurately reflected the respective conversations without alteration. Renton also testified that at the completion of the conversations he had removed a piece of plastic from the cassette tapes in order to make it impossible to erase the recordings. Renton identified the recordings that were offered into evidence as those he had made of the March 8 and April 3 conversations. On cross-examination, Dewey testified that he recognized petitioner's voice on the recordings because he had heard it every day (Tr. 104-106, 116-118, 160-163, 174-177). Molyneaux also identified the recording of the March 9 call that had been made from the DEA office and explained how it had been made (Tr. 44-45). Both Dewey and the DEA agent who had recorded the March 9 call testified that the recording that was offered into evidence was authentic (Tr. 110-113, 194-196). This testimony was adequate foundation for admission of the recordings. See *United States* v. *Knohl*, 379 F. 2d 427, 440-441 (2d Cir.), cert. denied, 389 U.S. 973 (1967); *Brandow* v. *United States*, 268 F. 2d 559, 567 (9th Cir. 1959); *Monroe* v. *United States*, 234 F. 2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956).

3. The government presented a DEA chemist who testified that his analysis showed the substances that petitioner had sold to Dewey were cocaine within the definition of controlled substances in Schedule II of 21 U.S.C. 812(c) (Tr. 235, 242, 244-253). Substantially in advance of trial, defense counsel had reviewed the reports of the results of the chemist's tests pursuant to the government's open file policy, and had been furnished with the reports pursuant to his motion under Fed. R. Crim. P. 16(a)(1)(D) (Tr. 288). During his testimony, the chemist referred to notes that he had made while performing his tests (Tr. 251); this was the first time that government counsel became aware of the notes.

At the conclusion of the chemist's direct testimony, the notes were furnished to petitioner and a recess was granted (Tr. 253, 256). After the recess, petitioner's chemical expert testified that he would need several days to review the notes and to make his own tests and, moreover, that he would not be available to testify again for four weeks (Tr. 261, 265, 272, 278). Petitioner's motion for a continuance of that length was denied, but at the completion of cross-examination of the government expert, a recess was declared until the next morning (Tr. 302). Copies of the notes to which the government expert had referred during his testimony were supplied to the defense for its use during the recess (Tr. 303).

There is no merit to petitioner's contention that the notes were improperly withheld by the government under Fed. R. Crim. P. 16 and therefore the trial court abused its discretion by denying the continuance as necessary rectification. In the first place, Rule 16(a)(1)(D) requires the production of the "results or reports" of tests—which were provided to petitioner. Nothing in the rule would appear to require the production of the notes used in making the reports that are produced. Moreover, petitioner's counsel was informed in advance of trial by his own expert that the latter would need the worknotes and graphs made by the government chemist (Tr. 263-265, 267), and nevertheless made no motion for production of them.[3] Any delay in production of the notes was therefore the result of lack of diligence on the part of the defense. Finally, the requested four-week continuance in the

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[3]Although there was some confusion regarding when petitioner's expert had made a specific request of defense counsel for the worknotes in the context of this case (Tr. 263-264, 267-268), he testified unequivocally that he always asked his clients the same questions, and therefore assumed that he had made such a request of petitioner's counsel (Tr. 264, 266-267).

middle of trial was unreasonable, particularly in light of the district court's finding (Tr. 289) that the situation complained of had been created by the defense's own strategy to surprise the government with a chemical defense.

4. Petitioner has made no showing that the district court abused its discretion by refusing to dismiss a juror for medical disability. The juror in question informed the court during voir dire that she suffered from rheumatoid arthritis and might not be able to serve during night sessions. When the court informed her that trial would recess each day by 5:30 p.m., she gave no further indication of an inability to serve and petitioner did not challenge her service at that time (Tr. 8-9). Petitioner moved to dismiss the juror because of illness on the second day of trial, when the juror arrived late. The court, in denying the motion, stated that the juror had expressed no reluctance to serve and had arrived late because she was under the misapprehension that the jury had been dismissed because of a hurricane that occurred on that day. At that point, since the one alternate juror had already been utilized, dismissal of the juror would have necessitated a mistrial (Tr. 304-305). Under these circumstances, the court did not abuse its discretion in refusing to dismiss the juror.

5. Petitioner's contention that the evidence was insufficient to sustain his conviction on the communication facility counts (Counts V-VI), because no felony in connection therewith was proven, is specious. Petitioner was charged in those two counts with using a communication facility in causing and facilitating the distribution of cocaine, in violation of 21 U.S.C. 843(b). By its convictions of petitioner on Counts I-IV, which charged violations of 21 U.S.C. 841(a), the jury clearly found

petitioner guilty of the distribution of cocaine. As a matter of law, the distribution of cocaine constitutes a felony, the commission or facilitation of which by the use of a communication facility is an offense under Section 843(b).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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